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Supreme Court, U.S.
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In The

Supreme Court of the United States

THOMAS L. BLACKBURN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a law enforcement officer's mistaken belief, based on his subjective perception, that a motorist is in violation of state law is sufficient to justify a stop of a vehicle where no such legal violation has, in fact, occurred?

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CONSTITUTIONAL PROVISION

Fourth Amendment, United States Constitution ..... *passim*

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit is not officially reported, and is reproduced as Appendix 1 to 11. The order entered by the United States District Court for the Northern District of Oklahoma denying Petitioner's motion to suppress the evidence is not officially reported and is reprinted in the Appendix 12 to 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 29, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the Tenth Circuit's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the
Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Okla.Stat.Ann. tit. 47, § 11-1401(i)

In pertinent part provides: "The Turnpike Authority[1] is . . . authorized to prescribed maximum and minimum speeds for trucks, buses and automobiles using turnpikes. . . . Such regulations shall become effective only after approval by the Commissioner of Public Safety, and after signs have been posted on the turnpike giving notice thereof. . . . It shall be a violation of this section to drive a vehicle at a faster rate of speed than such prescribed maximum speed or at a slower rate of speed than such prescribed minimum speed."

Okla.Stat.Ann. tit. 47, § 11-1401(k)

In pertinent part provides: "All vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon."

STATEMENT OF THE CASE

A. Procedural History

On December 6, 2001 Petitioner, Thomas L. Blackburn, was indicted in the United States District Court for

[1] This section of the statute was amended, effective November 1, 2001, such that "Turnpike Authority" was replaced with "Oklahoma Transportation Authority." The remaining pertinent parts of the statute remained the same. The statute, Okla.Stat.Ann. tit. 47, § 11-1401(i), on May 12, 2000, the date Blackburn was stopped by an Oklahoma Highway Patrolman, provided that the "Turnpike Authority" was responsible for setting speed limits on turnpikes. *See* App. 15, ¶16.

the Northern District of Oklahoma, charged with three counts of drug possession. On July 25, 2002, Mr. Blackburn entered a conditional guilty plea to the second count of the indictment, possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), reserving his right to appeal the district court's denial of his motion to suppress.

Mr. Blackburn was stopped by an Oklahoma Highway Patrolman on May 12, 2000 for traveling 52 miles per hour on the Will Rogers Turnpike in the Northern District of Oklahoma, in a zone where a sign said the speed limit was 45 miles per hour. However, that sign was not placed there by the Oklahoma Turnpike Authority. Under Oklahoma law, only the Oklahoma Turnpike Authority may set speed limits on Oklahoma turnpikes, pursuant to Okla.Stat.Ann. tit. 47, § 11-1401(i). The Oklahoma Turnpike Authority did not set a 45 miles per hour speed limit; instead, as the United States stipulated at the motion to suppress hearing, the legal maximum speed in the zone where Mr. Blackburn was stopped was 75 miles per hour. (App. 3, n.4). *See also*, District Court Order, App. 15, ¶16.

Mr. Blackburn was initially charged by the State of Oklahoma in Case No. CF-2000-63, District Court of Craig County, Oklahoma, for trafficking in marijuana. The District Court of Craig County, Oklahoma, suppressed the evidence and dismissed the charges, on the grounds the traffic stop violated the Fourth Amendment to the Constitution of the United States. (App. 24-33). On December 6, 2001, Mr. Blackburn was charged with three counts in an indictment in the United States District Court for the Northern District of Oklahoma. On February 20, 2002, the United States District Court for the Northern District of Oklahoma entered an order denying Mr. Blackburn's

motion to suppress. (App. 12-23). On July 25, 2002, Mr. Blackburn entered a conditional plea of guilty to one count, and reserved his right to appeal the denial of his motion to suppress. On October 9, 2002, the district court sentenced Mr. Blackburn to a term of sixty-six months in custody, special monetary assessment of $100.00, supervised release for five years, and a criminal monetary fine of $200,000.00.

The district court denied Mr. Blackburn's motion to suppress by holding the Oklahoma Highway Patrolman made a "mistake of fact" when he stopped Mr. Blackburn for going 52 miles per hour, despite the legal speed limit being 75 miles per hour. (App. 15, ¶17). The district court stated in a footnote that even if Mr. Blackburn did not exceed the legal speed limit established by the Oklahoma Turnpike Authority, he violated Okla.Stat.Ann. tit. 47, § 11-1401(k), which requires that "[a]ll vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon." (App. 16, n.1).

On appeal, the United States Court of Appeals for the Tenth Circuit held the Oklahoma Highway Patrolman "was not mistaken as to the scope of the applicable law, Okla.Stat.Ann. tit. 47, § 11-1401(i)," but was "simply unaware" the Oklahoma Turnpike Authority had not authorized a speed limit lower than 75 miles per hour. (App. 7, n.11). The court of appeals further held "Trooper Hise should not have been required to anticipate this fact." *Id.* In addition, the court of appeals, as did the district court, held Mr. Blackburn violated Okla.Stat.Ann. tit. 47, § 11-1401(k), requiring compliance with "signs placed on the turnpike regulating traffic thereon." *Id.*

B. Statement of the Facts

On May 12, 2000, at approximately 10:05 A.M., Petitioner Blackburn was driving a Ford pickup with a camper shell attached to the bed of the truck, East-bound on the Will Rogers Turnpike (Interstate 44). Oklahoma Highway Patrolman Hise was working "stationary radar" about a mile away, and clocked the pickup at 52 miles per hour in an area where a sign said the maximum speed was 45 miles per hour. Trooper Hise testified the only reason he stopped Mr. Blackburn was "he was speeding."

Under Oklahoma law, Okla.Stat.Ann. tit. 47, § 11-1401(i), speed limits on Oklahoma turnpikes must be set by the Oklahoma Turnpike Authority and then approved by the Oklahoma Commissioner of Public Safety. The only action which had ever been taken by those authorities for the area in question was to set a maximum speed limit of 75 miles per hour. The United States conceded below: "[w]e will agree that the Oklahoma Turnpike Commission [sic] had not officially changed the speed limit in this particular area to 45 miles an hour at the time the stop was made. . . ." *See* (App. 3, n.4). *See also*, District Court Order, App. 15, ¶16.

After turning on his lights and pulling Mr. Blackburn over, Trooper Hise informed Mr. Blackburn he had been stopped for speeding in a "construction zone" and asked Mr. Blackburn to step back to his patrol car. Trooper Hise testified Mr. Blackburn appeared nervous and felt several things were "odd", so he interrogated Mr. Blackburn for ten to fifteen minutes. Trooper Hise summoned another Highway Patrolman. Subsequently, Mr. Blackburn said "go ahead" to a request to search the pickup truck. Nothing was found in the front of the pickup truck. Trooper Hise

asked for the key to the camper shell, and Mr. Blackburn said he did not have a key. Trooper Hise nonetheless grabbed the tailgate handle, and the tailgate came open. Marijuana was found.

Mr. Blackburn was arrested and charged in the District Court of Craig County, Oklahoma with possession of marijuana. The District Court of Craig County, Oklahoma suppressed the evidence and dismissed the charges against Mr. Blackburn, finding the Fourth Amendment had been violated because there was no probable cause for the stop, since the Oklahoma Turnpike Authority had not reduced the speed limit from 75 miles per hour to 45 miles per hour. (App. 24-33).

On December 6, 2001, Mr. Blackburn was indicted in the United States District Court for the Northern District of Oklahoma on three counts, alleging violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1) and (b)(1)(B)(vii), and 18 U.S.C. § 1952(a)(3). On February 20, 2002, the district court denied Mr. Blackburn's motion to suppress the evidence. On July 25, 2002, Mr. Blackburn entered a conditional plea of guilty to count two (21 U.S.C. § 841(a)(1) and (b)(1)(B)(vii)), with the other two counts being dismissed. On October 9, 2002, the district court sentenced Mr. Blackburn to a term of sixty-six months in custody, a special monetary assessment of $100.00, supervised release for five years and a criminal monetary fine of $200,000.00

The district court has permitted Mr. Blackburn to remain free while the case has been appealed to the United States Court of Appeals for the Tenth Circuit, and a writ of certiorari is sought from this Court.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE TENTH CIRCUIT, CONSISTENT WITH PRIOR *EN BANC* AUTHORITY OF THAT CIRCUIT, IS IN DIRECT CONFLICT WITH DECISIONS FROM THE DISTRICT OF COLUMBIA, FIFTH AND NINTH CIRCUITS – ALL HOLDING THAT A LAW ENFORCEMENT OFFICER'S MISTAKEN BELIEF THAT A MOTORIST IS IN VIOLATION OF STATE LAW IS INSUFFICIENT TO JUSTIFY A STOP OF A VEHICLE

The Court should grant certiorari because the decision of the United States Court of Appeals for the Tenth Circuit, consistent with *en banc* authority of that circuit,[2] is in direct conflict with decisions from the District of Columbia, Fifth and Ninth Circuits. Prior law from these courts of appeal has held the law enforcement officer's mistaken belief that a motorist is in violation of state law is insufficient to justify a stop of a vehicle. The Seventh Circuit, like the Tenth, does not require an actual violation of the law to justify a stop of a vehicle.

The Fifth Circuit held, in *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999), that a police officer's stop of a vehicle based on his mistaken belief that

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[2] The decision of the Tenth Circuit in this case is not an isolated holding that less than probable cause justifies a stop of a vehicle. In *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (*en banc*) (" . . . a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring").

a taillight was in violation of Texas law violated the Fourth Amendment. The Fifth Circuit said:

> . . . if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.

The Fifth Circuit specifically noted that good-faith exceptions to the exclusionary rule have, in the Fifth Circuit, "always involved circumstances extrinsic to the government agent's personal observations at the time of the stop." *Id.*, n.6.

The Fifth Circuit's logic in *Lopez-Valdez* is unassailable. The Fourth Amendment requires that the Government not be able to stop vehicles at random, simply because the law enforcement official feels like doing so. The Fourth Amendment does permit, however, stops which are objectively reasonable. Without objectivity as the determining standard for the reasonableness, there is no effective check on Governmental intrusion. If stops may occur because the law enforcement officer testifies he or she "thought" the law was X, even though the law was non-X, courts are necessarily left with probing what was in the mind of the law enforcement officer. To prevent precisely this amorphous and vast expansion of the power of law enforcement to stop vehicles, the stop must be based on whether the law was in fact violated, because any other standard requires probing what was in the mind of the law enforcement officer. Because an exercise of probing what was in the mind of the law enforcement officer is virtually boundless, failure to require that a violation in fact has

occurred is to present precisely the issue faced by this Court in *Delaware v. Prouse*, 440 U.S. 648 (1979), which the Court described, 440 U.S. at 661, as "the unbridled discretion of law enforcement officials." There, the Court said probable cause for a stop was required. Of course, the underlying premise of probable cause is the actual commission of an offense.

This Court took an even stronger position on the irrelevance of "subjective intentions" of law enforcement officers in *Whren v. United States*, 517 U.S. 806 (1996). In that case, petitioners wanted the Fourth Amendment to require the law enforcement officer to act reasonably in making the stop for the reason he or she gave. Justice Scalia, writing for a unanimous Court, said "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.*, p. 813. The Court, in arriving at its holding, said:

> For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure. Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct. The judgment is *Affirmed*. *Id.*, p. 819.

In Mr. Blackburn's case, we most assuredly have a "run-of-the-mine" case. His pickup truck was traveling down the Will Rogers Turnpike, an interstate highway (I-44). The only legally justifiable basis for a stop of his vehicle was

probable cause. And probable cause requires the commission of an offense. ***Because the Fourth Amendment requires that law enforcement not have unbridled discretion in making stops of vehicles, "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."*** There being no probable cause for the stop of Mr. Blackburn, the evidence should have been suppressed and the conviction reversed.

In *United States v. Granado*, 302 F.3d 421, 424 (5th Cir. 2002), the Fifth Circuit held an officer's mistaken belief that a license plate violated Texas law did not justify the stop of the vehicle, and that the violation of the Fourth Amendment was "unmistakable."

In *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998), the Fifth Circuit, noting that a vehicle's flashing of a turn signal without turning or changing lanes was not a violation of Texas law, held a stop by the officer who thought such conduct was a violation of law, was contrary to the requirements of the Fourth Amendment. The court of appeals observed:

> The rule articulated by the Supreme Court in *Whren* provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. [footnote omitted]. But the flip side of that leeway is that the legal justification must be objectively grounded. *See Whren*, 517 U.S. at 812-14, 116 S.Ct. at 1774; *see also Goodwin v. Johnson*, 132 F.3d 162, 173 (5th Cir. 1998) ("***So long as a traffic law infraction that would have objectively justified the stop had taken place***, the fact that the police officer may have made the

> stop for a reason other than the occurrence of the traffic infraction is irrelevant for purposes of the Fourth Amendment." (emphasis added)). Here, given that having a turn signal on is not a violation of Texas law, no objective basis for probable cause justified the stop of Miller.

In *United States v. Whitfield*, 939 F.2d 1071, 1073-1074 (D.C.Cir. 1991), the District of Columbia Circuit reversed a ruling denying a motion to suppress where the police officers were mistaken about the ability of a relative to legally consent to the search. The court of appeals stated: "[t]he Supreme Court, Whitfield argues, held only that the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake of fact, as distinguished from a mistake of law. Whitfield's reading of *Rodriguez* [110 S.Ct. 2793] is correct."

In *United States v. King*, 244 F.3d 736 (9th Cir. 2001), the Ninth Circuit reversed denial of a motion to suppress where the officer thought there was a violation of the traffic laws concerning the rear view mirror. The court of appeals said:

> Even a good faith mistake of law by an officer cannot form the basis for reasonable suspicion, because 'there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law." (citation omitted). 244 F.3d at 739.

The Ninth Circuit noted the officer "acted reasonably and his interpretation of the traffic law was reasonable, he was nonetheless mistaken in his belief that King's conduct violated the law." *Id.*, p. 741. Therefore, "[b]ecause an officer's mistake of law cannot form the basis for reasonable suspicion to initiate a traffic stop, we reverse the

district court's denial of King's motion to suppress." *Id.*, pp. 741-742. The *King* case cites numerous other cases where the Ninth Circuit has reached the same result, on the same reasoning.

The issue, then is quite simple: if a police officer is mistaken about what the law is, does this constitute a mistake of law, or a mistake of fact? Both the district court and the United States Court of Appeals held the Oklahoma Highway Patrolman's mistake about the legal speed limit was a mistake of fact, not a mistake of law. This is logically absurd. The "fact" is that Mr. Blackburn was traveling 52 miles per hour. The "law" is that 52 miles per hour was not in excess of the 75 miles per hour speed limit. The trooper was simply wrong about the applicable law.

In addition to the inescapable logic set forth in the preceding paragraph, the decisions of the district court and of the United States Court of Appeals for the Tenth Circuit are flatly contradicted by the law articulated in the District of Columbia, the Fifth and the Ninth Circuits, as discussed above.

Since the Oklahoma Highway Patrolman was mistaken about the law, he was without an objectively valid reason for the stop, and the motion to suppress should have been granted.

Both the district court and the United States Court of Appeals for the Tenth Circuit also justified their decisions by saying Okla.Stat.Ann. tit. 47, § 11-1401(k) required Mr. Blackburn to "comply at all times with signs placed on the turnpike regulating traffic thereon." Startlingly, the court of appeals observed in n.2, App. 2, "It is not clear from the record whether the signs were posted by the Oklahoma

Turnpike Commission [sic] or by one of the construction firms doing work on the turnpike." The record is quite clear, and uncontradicted, that the Oklahoma Turnpike Authority did not place any signs at the place of the alleged infraction, as pointed out in the very next sentence of n.2! Of necessity, the Oklahoma statute at issue must be read (in light of the rule of lenity, elemental logic, and the terms of the statute) to require compliance with signs **legally** placed on the turnpike. Indeed, § 11-1401(i) says regulations concerning maximum speeds shall become effective after (i) approval by the Oklahoma Turnpike Authority; (ii) approval of the Oklahoma Commissioner of Public Safety; and (iii) posting of signs reflecting what has been approved and authorized by the Turnpike Authority and the Commissioner of Public Safety. Thus, the statute itself says speed limits are effective only after the authorization process is observed, and signs are posted reflecting the results of that authorization process. Moreover, even if the Turnpike Authority itself had posted the sign, it would have been an illegal posting, because the Turnpike Authority never authorized a speed limit below 75 miles per hour at the place of the infraction.

To read § 11-1401(k) to require compliance with any sign on the turnpike, regardless of who placed it there, and regardless of whether the sign was legally posted in compliance with the authorization process, leads to absurd results. Signs placed on the turnpike by kids as a prank certainly do not have the imprimatur of law. Neither do billboards. And neither do signs posted by construction companies. Under Oklahoma law a construction company cannot decree the speed limit on the turnpike – only the Oklahoma Turnpike Authority, by passing a specific resolution, may do so. Thus, the statute must be read as

interposing the word "legally" between the word "signs" and the word "placed".

Finally as to compliance with signs, it is a basic rule of statutory construction that the specific controls over the general. The general provision of the Oklahoma statutes which requires compliance with signs posted on the turnpike (§ 11-1401(k)) cannot overrule the specific provision on speed limits and the posting of signs reflecting same (§ 11-1401(i)). Under Oklahoma law no speed limit sign is legal until it has been posted following approval by the Turnpike Authority and the Commissioner of Public Safety. Since neither of those approvals preceded the posting of the sign in this case, the sign was of no legal force or effect whatsoever.

The Seventh Circuit has held a law enforcement officer's belief that a traffic or equipment offense has been committed is sufficient to justify a stop, even if it turns out there is no offense. In *United States v. Cashman*, 216 F.3d 582 (7th Cir. 2000), a stop was made when the law enforcement officer believed he had observed a vehicle with an "excessively" cracked windshield (the Wisconsin statutory definition). The district court specifically found the crack to be "excessive." The defendant appealed to the Seventh Circuit, saying the crack was not "excessive." The Seventh Circuit said it was not necessary to reach that issue because the crack was clearly "substantial", and this provided probable cause for the stop. Arguably, *Cashman* does not conflict with the decisions of the District of Columbia, Fifth and Ninth Circuits, because: (i) the district court found there was in fact a violation of the statute because the crack was "excessive," and the Seventh Circuit did not reverse that finding of the district court; and (ii) the Wisconsin statute, by utilizing the word

"excessive," specifically left open to judgment and interpretation both by law enforcement and the courts as to what would be "excessive." When a statute requires interpretation by law enforcement and the courts as to its meaning, one has a vastly different situation from one where the issue is whether the legal speed limit was 45 miles per hour rather than 75 miles per hour. No interpretation by law enforcement or the courts is required. At the same time, in fairness, *Cashman* could be read as supportive of the position taken by the Tenth Circuit, which is contrary to that of the District of Columbia, Fifth and Ninth Circuits.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS L. BLACKBURN, Defendant-Appellant.	No. 02-5173 (D.C. No. 01-CR-86-H) (N.D. Oklahoma)

ORDER AND JUDGMENT*

(Filed May 29, 2003)

Before **TACHA**, Chief Judge, **BRORBY**, Senior Circuit Judge, and **O'BRIEN**, Circuit Judge.

On July 25, 2002, Defendant-Appellant, Thomas L. Blackburn, entered a conditional guilty plea to one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), reserving his right to appeal the district court's denial of his motion to suppress.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Defendant filed a timely notice of appeal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. Background[1]

On May 12, 2000, Oklahoma Highway Patrol ("OHP") Trooper Gene Hise was working a "stationary radar" at mile marker 286 on the Will Rogers Turnpike. Defendant Blackburn was traveling eastbound on the turnpike in a Ford F-150 pickup truck when Trooper Hise clocked his speed at 52 miles per hour. The posted speed limit was 45 miles per hour[2] – the area was a designated construction zone – and there were construction workers present. Trooper Hise stopped Blackburn, based on the fact that Blackburn's speed exceeded the posted speed limit.

Apparently, on May 12, 2000, the Oklahoma Turnpike Authority had not changed the speed limit for the area in question, in accordance with the applicable procedures

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[1] We note that, regarding certain disputed issues of fact, the district court found Trooper Hise's testimony to be "credible" and Defendant Blackburn's testimony to be "not credible." Dist. Ct. Order at 1, 8, 9. Because we do not find this determination to be clearly erroneous, we do the same. *See United States v. McRae*, 81 F.3d 1528, 1533 (10th Cir. 1996) ("Determinations of witness credibility [are] review[ed] for clear error.").

[2] It is not clear from the record whether the signs were posted by the Oklahoma Turnpike Commission or by one of the construction firms doing work on the turnpike. According to the affidavit of Oklahoma Transportation Authority's chief engineer, Stacey Trumbo, "[a]ny signs, cones, or barrels present at Mile Marker 287 on the Will Rogers Turnpike on May 12, 2000, were not placed there by the Oklahoma Transportation Authority."

under Oklahoma law.[3] Accordingly, despite the fact that the posted speed limit was 45 miles per hour, the legal maximum speed was 75 miles per hour.[4] Officer Hise was not aware of the fact that the posted speed limit, 45 miles per hour, did not accurately reflect the legal speed limit as established by the Oklahoma Turnpike Authority.[5]

Trooper Hise requested that Blackburn accompany him to his squad car. During his initial contact with Blackburn, Trooper Hise observed the following: "[Blackburn] was uptight. He wasn't making a lot of eye contact with me. His belly was quivering. His carotid artery in his neck was extremely fast, his pulse, his heart rate was – was up." On cross-examination, Trooper Hise stated all of these factors boiled down to "nervousness." Trooper Hise informed Blackburn that he was going to issue a "courtesy warning," but Blackburn's nervousness persisted. Trooper

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[3] Under Okla. Stat. Ann. tit. 47, § 11-1401(I): "The Oklahoma Transportation Authority is . . . authorized to prescribe maximum and minimum speeds for trucks, buses and automobiles using turnpikes. . . . Such regulations shall become effective only after approval by the Commissioner of Public Safety, and after signs have been posted on the turnpike giving notice thereof." Apparently, the Oklahoma Transportation Authority has delegated certain responsibilities relating to construction zones to the Oklahoma Turnpike Authority.

[4] The government stipulated to this fact at the motion to suppress hearing.

[5] As the district court noted, even if Blackburn did not exceed the speed limit established by the Oklahoma Turnpike Authority, he was still in violation of Oklahoma law. Under Okla. Stat. Ann., tit. 47, § 11-1401(K), "All vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon." It is undisputed that, at the time in question, the posted speed limit was 45 miles per hour.

Hise also noticed that Blackburn was at times "unresponsive."[6]

While filling out the citation form, Trooper Hise asked Blackburn a number of questions, including his starting point, destination, and whether he owned the vehicle.[7] On cross examination, defense counsel asked Trooper Hise whether these questions were "necessary to finish and to do the purpose of filling out that particular warning"? Trooper Hise responded, "I would say no, sir."

After Blackburn signed the warning, he exited Trooper Hise's squad car and headed back towards the truck. By this time, Trooper Hise's partner, Trooper Buddy Lambert, had arrived at the scene.[8] Trooper Hise told him to "slow down" and "be careful on his trip" and that he was "free to go." Before Blackburn opened the driver-side door, however, Trooper Hise asked "if he had a minute . . . [to] visit with him." At the time of this request, Trooper Hise was standing at the rear of the truck, approximately nine feet from Blackburn, while Trooper Lambert was standing between the squad car and the truck. Blackburn responded, "Sure."[9]

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[6] Blackburn later advised Trooper Hise that he had a hearing problem.

[7] Blackburn was not the registered owner of the truck.

[8] At some point during his conversation with Blackburn, Trooper Hise requested that his partner, Trooper Buddy Lambert, come to the scene.

[9] Trooper Hise testified that if Blackburn had not consented to the additional questioning, he would have detained him. In response to defense counsel's question concerning whether Blackburn was really "free to go," Trooper Hise responded, "No, sir, I was lying to him."

(Continued on following page)

Trooper Hise first asked Blackburn why he was so nervous. Trooper Hise then asked whether there was "anything illegal in the truck," to which Blackburn responded, "Not that I know of." At this point, Trooper Hise requested Blackburn's permission to search the truck. Blackburn responded, "Go ahead." This occurred approximately fifteen minutes after the initial stop.

Trooper Hise first searched the cab area of the truck. He then proceeded to the back of the truck, but he realized that he could not access the "camper shell." Trooper Hise asked Blackburn for the key to the camper shell, and Blackburn told him that "there was no key." According to Trooper Hise's testimony, "then I walked back to the rear of [the truck] and I grabbed the tailgate handle and down the tailgate came." After the tailgate opened, Trooper Hise observed a baby's mattress and perceived the odor of raw marijuana.[10] Trooper Hise then advised Blackburn that he was under arrest and advised him of his *Miranda* rights. Government authorities later determined that the truck contained over 1,000 pounds of marijuana.

On July 25, 2002, Blackburn conditionally pled guilty to one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), reserving

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Trooper Hise testified that "in my internal dialect he was under investigative detention." In fact, Trooper Hise indicated that, based on his training, "[he knew] that they have to be free to go before [he] can say 'oh, by the way.'" The fact remains, however, that Trooper Hise represented to Blackburn that he was free to go. Furthermore, Blackburn clearly believed he was free to leave because he proceeded to turn around and start back toward the truck.

[10] Trooper Hise testified that he is very familiar with the smell of marijuana.

his right to appeal the district court's denial of his motion to suppress. This appeal followed.

II. Discussion

A. Standard of Review

We review the district court's denial of a motion to suppress for clear error. *United States v. Soto,* 988 F.2d 1548, 1551 (10th Cir. 1993) (citations omitted). In conducting our review, we consider the evidence in the light most favorable to the district court's ruling. *Id.* (citations omitted). We review de novo, however, the ultimate determination of reasonableness under the Fourth Amendment. *Id.* (citations omitted).

B. Whether Trooper Hise's Search of Blackburn's Truck and Seizure of the Marijuana was Constitutional Under the Fourth Amendment.

In reviewing the constitutionality of traffic stops under the Fourth Amendment, we conduct a two-step inquiry. First, we must determine "whether the officer's action was justified at its inception." *United States v. Gonzalez-Lerma,* 14 F.3d 1479, 1483 (10th Cir. 1994). Second, we must consider "whether the action was reasonably related in scope to the circumstances that first justified the interference." *Id.* Further detention or questioning, unrelated to the traffic stop, is only permissible (1) where the officer "has an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring," or (2) "if the initial detention has become a consensual encounter." *Id.* (citations omitted).

1. *The initial traffic stop*

"[A] detaining officer must have an objectively reasonable articulable suspicion that a traffic violation has occurred or is occurring before stopping [an] automobile." *Soto,* 988 F.2d at 1554 (citation omitted). In this case, "[o]ur sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction." *United States v. Botero-Ospina,* 71 F.3d 783, 787 (10th Cir. 1995) (citation omitted).

Here, Trooper Hise had objectively reasonable, articulable suspicion that Blackburn's speed exceeded the posted legal maximum speed for the area in question, in violation of Oklahoma law. *See* Okla. Stat. Ann. tit. 47, § 11-1401(I) ("It shall be a violation of this section to drive a vehicle at a faster rate of speed than such prescribed maximum speed or at a slower rate of speed than such prescribed minimum speed."). Although the *posted* legal maximum speed did not reflect the *actual* legal maximum speed, Officer Blackburn's actions were still reasonable, insofar as he was unaware of the discrepancy.[11] Accordingly, we

[11] Blackburn's reliance on *United States v. Lopez-Valdez,* 178 F.3d 282 (5th Cir. 1999), *United States v. King,* 244 F.3d 736 (9th Cir. 2001), and *United States v. Twilley,* 222 F.3d 1092 (9th Cir. 2000), is unavailing, insofar as all three cases are factually distinguishable. In this case, Trooper Hise was not mistaken as to the scope of the applicable law, Okla. Stat. Ann. tit. 47, § 11-1401(I). Rather, he was simply unaware that, on May 12, 2000, the Oklahoma Turnpike Authority had not changed the official speed limit for the area in question, in accordance with applicable procedures under Oklahoma law. Trooper Hise should not have been required to anticipate this fact. *Cf. Michigan v. DeFillippo,* 443 U.S. 31, 37-38 (1979) ("A prudent officer, in the course of

(Continued on following page)

hold that Trooper Hise's initial stop of Blackburn comported with the requirements of the Fourth Amendment. *See Soto,* 988 F.2d at 1554.

2. *The investigative detention*

"During a routine traffic stop, the detaining officer may request a driver's license and vehicle registration, run a computer check on the car and driver, and issue a citation." *Id.* (citations omitted). In addition, the detaining officer may question the vehicle's occupants regarding their identity, travel plans, and ownership of the vehicle. *United States v. Rivera,* 867 F.2d 1261, 1263 (10th Cir. 1989). Once an officer has issued a citation in a traffic stop, " '[i]f the driver produces a valid license and proof of right to operate the vehicle, the officer must allow him to continue on his way without delay for further questioning.' " *Soto,* 988 F.2d at 1554 (citing *United States v. Pena,* 920 F.2d 1509, 1514 (10th Cir. 1990)).

In this case, Trooper Hise issued a warning citation and the overall duration of the detention was approximately fifteen minutes.[12] Further, Trooper Hise's questions while issuing the citation related to Blackburn's travel

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determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional."). Further, Blackburn was still operating his vehicle in violation of Oklahoma law. *See* Okla. Stat. Ann. tit. 47, § 11-1401(K) ("All vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon.").

[12] Here, we refer to the time it took Trooper Hise to issue the warning.

plans and ownership of the truck. Thus, under *Soto* and *Rivera,* Trooper Hise's actions were within the legitimate scope of the traffic stop. Once Trooper Hise returned Blackburn's documentation and finished issuing the citation, he told Blackburn he was free to go and Blackburn started to return to his truck. At this point, Trooper Hise's continued questioning of Blackburn was proper because the encounter between Trooper Hise and Blackburn became consensual. *See United States v. Hernandez,* 93 F.3d 1493, 1498-99 (10th Cir. 1996) (finding that an encounter became consensual where officer returned license and registration, told defendant he was free to go, defendant turned to leave, and officer then requested without any show of force that defendant answer a few more questions).

3. *The search*

In this case, the district court concluded that Blackburn voluntarily consented to Trooper Hise's search of his truck and that Trooper Hise's search did not exceed the scope of Blackburn's consent. Dist. Ct. Order at 8-9. For the reasons set forth below, we agree.

a. *Whether Blackburn Voluntarily Consented to the Search of His Truck.*

"Whether or not a party has voluntarily consented to a search is a question of fact that the district court must evaluate in view of the totality of the circumstances." *United States v. Doyle,* 129 F.3d 1372, 1377 (10th Cir. 1997) (citations omitted). In the present case, the district court found that Blackburn voluntarily consented, and "we

must accept that finding unless it is clearly erroneous." *Soto,* 988 F.2d at 1557.

In *United States v. Dewitt,* we held that the defendant's consent was consensual based on the following facts: (1) the defendant answered "yes" to the trooper's request to search the vehicle; (2) the "defendant stood silently behind the automobile during the course of the search"; and (3) the trooper did not make any "show of force or intimidation." 946 F.2d 1497, 1500 (10th Cir. 1991).

The facts in this case are similar to *Dewitt.* Blackburn responded "Go ahead" when Trooper Hise requested permission to search his truck. Further, Blackburn was only a few yards from the truck during the search, and he raised no objections to Trooper Hise's actions. Finally, Blackburn does not contend that Trooper Hise or Trooper Lambert made any "show of force or intimidation." *Id.* In light of these facts, we cannot conclude that the district court's conclusion was clearly erroneous. *Soto,* 988 F.2d at 1557.

b. *Whether the Scope of Trooper Hise's Search was Reasonable.*

Whether a search remained within the boundaries of the consent is a question of fact, which we review for clear error based on the "totality of the circumstances." *United States v. Pena,* 920 F.2d 1509, 1514 (10th Cir. 1990). " 'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect.' " *United States v. Ramstad,* 219 F.3d 1263,

1266 (10th Cir. 2000) (citation omitted). Ordinarily, an individual's consent to an officer's request to search his vehicle authorizes a thorough and complete search of the vehicle, absent either (1) a request by the officer with a limitation in scope, or (2) a limiting instruction included in the individual's consent. *See United States v. Elliott,* 107 F.3d 810, 815 (10th Cir. 1997) (citing cases).

In this case, Trooper Hise did not limit his request for consent. Nor did Blackburn's response ("Go ahead") in any way limit his consent. Although Blackburn argues that he subsequently limited the scope of his consent by telling Trooper Hise that he did not have a key for the camper shell, we disagree. "'[T]he typical reasonable person [would not] have understood [this] exchange between [Trooper Hise] and [Blackburn]'" as limiting Blackburn's earlier consent. *See Ramstad,* 219 F.3d at 1266. Thus, Blackburn consented to a thorough search of his truck, and Trooper Hise's search pursuant to Blackburn's consent did not violate the Fourth Amendment.

III. Conclusion

Based on the foregoing, we AFFIRM the district court's denial of Blackburn's motion to suppress and AFFIRM his conviction under 21 U.S.C. § 841(a)(1).

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 01-CR-86-H
THOMAS L. BLACKBURN,	)	
Defendant.	)	

ORDER

(Filed Feb. 20, 2002)

This matter comes before the Court pursuant to Defendant Thomas L. Blackburn's motion to suppress evidence and statements, filed January 15, 2002 (Docket No. 20). For the reasons set forth below, and in accordance with the ruling announced at the hearing, Defendant's motion is hereby denied.

I

Based upon the testimony given at the hearing, the Court hereby enters the following findings of fact. In finding these facts, the Court expressly credits Officer Gene Hise's statement of events and rejects the conflicting testimony of Mr. Blackburn as not credible.

1. Officer Gene Hise has been a patrol trooper employed by the Oklahoma Highway Patrol for 11 years. On May 12, 2000, Officer Hise was assigned to the Will Rogers Turnpike as a traffic trooper.

2. At approximately 10:00 a.m., Officer Hise was monitoring the speed of passing vehicles from his patrol unit in a construction zone on the turnpike. At that time, there were barrels throughout the construction zone funneling the traffic into one lane. There were also workers on the highway in that area.

3. Officer Hise's unit was positioned approximately one mile past a sign indicating that the speed limit was 45 miles per hour. The speed limit sign was a black and white, metal steel sign. The front of the sign on which the posted speed limit appeared was identified in all respects as any other speed limit sign similarly placed along any highway in Oklahoma.

4. At approximately 10:00 a.m., Officer Hise clocked a pickup truck coming toward him, traveling at 52 miles per hour. Based on the posted speed limit of 45 miles per hour, Officer Hise reasonably believed that the vehicle was exceeding the speed limit.

5. Officer Hise stopped the pickup truck because it was exceeding the posted speed limit. The driver of the truck was Thomas L. Blackburn.

6. Officer Hise asked Mr. Blackburn to step back to his unit. Officer Hise talked with Mr. Blackburn about his speed and wrote him a courtesy warning. Officer Hise also made conversation with Mr. Blackburn about his trip. Mr. Blackburn informed Officer Hise that the truck he was driving did not belong to him.

7. While Mr. Blackburn was in his unit, Officer Hise called Trooper Buddy Lambert, who had been parked nearby, to the location.

8. After giving Mr. Blackburn his copy of the courtesy warning, Officer Hise told him to be careful on his trip home and that he was free to go. Mr. Blackburn started walking back to the truck.

9. Before Mr. Blackburn got back inside the truck, Officer Hise asked him whether he had time to stay for some additional questions. In so doing, Officer Hise did not create any atmosphere of duress. Mr. Blackburn voluntarily agreed to stay and talk with Officer Hise.

10. Officer Hise asked Mr. Blackburn for permission to search the truck, and Mr. Blackburn voluntarily consented, saying, "Go ahead."

11. Officer Hise first searched the cab area of the truck. After searching the cab, Officer Hise went to the rear of the truck. The truck had a camper shell with a single key-hole latch handle. Officer Hise tried the handle of the camper shell and realized it was locked.

12. Mr. Blackburn witnessed the search of his vehicle. During the search, Mr. Blackburn was standing in front of Officer Hise's unit, approximately six feet behind the truck. At no time did Mr. Blackburn suggest that the bed area of the truck should not be searched or otherwise object to the scope of the search.

13. After trying the handle of the camper shell, Officer Hise asked Mr. Blackburn for the key. In response, Mr. Blackburn stated that he did not have the key. Mr. Blackburn did not indicate that he was withdrawing his prior consent to a search of the truck or otherwise limiting the scope of the original consent to search the truck.

14. At that point, Officer Hise tried the tailgate handle and pulled down the tailgate. Officer Hise did not

use any tools or special force to open the tailgate. The pulling down of the tailgate did not damage the camper shell or any other part of the truck.

15. When Officer Hise opened the tailgate, a baby's mattress slid out, and he detected a strong odor of raw marijuana. At that point, Officer Hise advised Mr. Blackburn he was under arrest. He placed Mr. Blackburn in handcuffs, placed him in the front seat of his unit, and advised him of his rights.

16. On May 12, 2000, the Oklahoma Turnpike Authority was responsible for setting speed limits on Oklahoma turnpikes, including construction zones. The Oklahoma Turnpike Authority had not officially changed the speed limit in this particular area to 45 miles per hour at the time the stop was made. Accordingly, notwithstanding the posted speed limit, the legal minimum speed was 50 miles per hour and the legal maximum speed was 75 miles per hour at the time Mr. Blackburn was stopped for speeding. The posted 45 miles per hour speed limit did not accurately reflect the legal speed limit established by the Oklahoma Turnpike Authority in accordance with applicable legal procedure.

17. On May 12, 2000, Officer Hise mistakenly believed that the legal speed limit established by the Oklahoma Turnpike Authority in the construction zone in question was 45 miles per hour, based on the speed limit sign so indicating. This is a mistake of fact, due to the posting of the 45 miles per hour speed limit on a standard speed limit sign. This belief was reasonable.

II

In the Tenth Circuit, the standard for determining the constitutionality of a traffic stop under the Fourth Amendment is as follows: "[A] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Callarman*, 273 F.3d 1284, 1286 (10th Cir. 2001) (quoting *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995)). The initial stop of the vehicle must be objectively justified. *See Botero-Ospina*, 71 F.3d at 788. The proper inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction. *See Callarman*, 273 F.3d at 1287.

Officer Hise believed, based on his eleven years of experience and training, that by exceeding the posted speed limit, Mr. Blackburn committed a traffic violation.[1] The Court finds that the testimony of Officer Hise, which was highly credible, established that he had a reasonable articulable suspicion that a traffic violation had occurred.

Defendant argues that because the mandatory procedure for reducing the speed limit on an Oklahoma turnpike established by title 47, section 11-1401(I) of the

[1] The Court notes that even if Mr. Blackburn did not exceed the speed limit established by the Oklahoma Turnpike Authority, it is uncontroverted that he did, at the very least, violate title 47, section 11-1401(k) of the Oklahoma Statutes, which provides as follows: "(k) All vehicles traveling on a turnpike shall comply at all times with signs placed on the turnpike regulating traffic thereon."

Oklahoma Statutes had not been followed, the legal speed limit at the time and place of the stop was 75 miles per hour; therefore, Defendant reasons, he committed no violation of the traffic laws at the time he was stopped. Defendant argues that without an actual violation of the law, a traffic stop is unconstitutional, relying on *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996), and *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998).

In *United States v. Gregory*, the defendant was stopped based on a single occurrence of his truck crossing two feet into the right shoulder emergency lane of the interstate. The incident happened as the defendant was being passed by the officer who was in pursuit of another vehicle for speeding. The officer testified that crossing into the emergency lane of a roadway is a violation of Utah law, which requires that a vehicle be operated as nearly as practical entirely within a single lane and may not be moved from the lane until the operator has determined the movement can be made safely. 79 F.3d at 975-76. The court found that an isolated incident of a vehicle crossing into the emergency lane of a roadway was not a violation of state law. The court reasoned:

> [I]f failure to follow a perfect vector down the highway or keeping one's eyes on the road were sufficient reasons to suspect a person of driving while impaired, a substantial portion of the public would be subject each day to an invasion of their privacy.... The totality of the circumstances suggests that the stop did not meet the reasonableness test of the Fourth Amendment which protects the security of one's privacy against arbitrary intrusion by the police.

79 F.3d at 978-79 (internal quotations and citations omitted).

In *United States v. Miller*, the defendant was stopped for having a turn signal on without turning or changing lanes. The prosecution argued that a flashing turn signal violated the following section of the Texas Transportation Code: "A person may not operate a motor vehicle equipped with a red, white, or blue beacon, flashing, or alternating light unless the equipment is (1) used as specifically authorized by this chapter; or (2) a running lamp, headlamp, backup lamp, or turn signal that is used as authorized by law." *Id.* at 277. The prosecution argued that flashing a light without turning or changing lanes is not "specifically authorized by law." The defendant argued that the statute did not provide sufficient notice of such a violation. The court agreed, starting that a plain reading of the Code provisions did not support the view that having a turn light on without turning or changing lanes is a violation of state law. *Id.* at 278.

Defendant also relies on Judge Murphy's dissent in *United States v. Ramstad*, 219 F.3d 1263 (10th Cir. 2000). Judge Murphy argued that a police officer's mistaken view of state law such that he believed the defendant had committed a traffic violation, when he in fact had not, did not provide the reasonable suspicion for a traffic stop required by the Fourth Amendment. *Id.* at 1267-68. Judge Murphy stated that "failure to understand the law by the very person charged with enforcing the law is not objectively reasonable," and that "if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." *Id.* at 1268.

The present case is distinguishable from *Gregory*, *Miller*, and Judge Murphy's dissent in *Ramstad*. In this case, those concerns about arbitrary intrusion into privacy rights and those problems with lack of notice of a violation simply are not present. Clearly, Mr. Blackburn was on notice that he could be stopped for speeding if he traveled faster than 45 miles per hour because there was a speed limit sign so indicating. Officer Hise did not arbitrarily stop Mr. Blackburn based on a mistaken understanding of the traffic laws; rather, he stopped Mr. Blackburn for failing to comply with the posted speed limit. When a police office stops a motorist for exceeding the posted speed limit, there is no excessive intrusion into privacy rights. Officer Hise believed that the posted speed limit accurately reflected the legal speed limit established by the Oklahoma Turnpike Authority in the area. This was a mistake of fact. Officer Hise did not know that the mandatory procedure for reducing the speed limit had not been followed. This was a mistake of fact.

Moreover, the standard for judging the reasonableness of the stop is not whether Mr. Blackburn in fact exceeded the legal speed limit. The standard is whether Officer Hise had a reasonable articulable suspicion that a traffic or equipment violation had occurred or was occurring. Under the present facts, Officer Hise clearly had a reasonable articulable suspicion that a traffic violation had occurred or was occurring.

III

Having determined that the stop was constitutional, the Court must next consider whether Officer Hise impermissibly detained Mr. Blackburn beyond what was

necessary to issue the courtesy warning. The Court credits the testimony of Officer Hise and does not credit the description of events given by Mr. Blackburn in this regard. Crediting such testimony, the Court finds as a matter of fact that Officer Hise asked Mr. Blackburn whether he had time to stay for some additional questions and moved to the front of his unit to engage in that conversation, and in so doing did not extend the stop longer than necessary to effect legitimate law enforcement purposes.

IV

The Court must next consider the validity of Mr. Blackburn's consent to the search of the truck. Mr. Blackburn argues that his consent to the search was not voluntary. Whether a consent to search is voluntary or was a product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *See United States v. Benitez*, 899 F.2d 995, 998 (10th Cir. 1990) (citing *United States v. Mendenhall*, 446 U.S. 544, 577 (1980)).

Officer Hise testified that he asked Mr. Blackburn if he could search the truck, and Mr. Blackburn said, "Go ahead." Officer Hise also testified that neither he nor Trooper Lambert ever attempted to be overbearing; rather, Officer Hise testified that he was extremely courteous to Mr. Blackburn, and Mr. Blackburn was courteous in return. Officer Hise testified that he believed that Mr. Blackburn was able to hear what he was saying. Officer Hise also testified that he suspected Mr. Blackburn of criminal activity and believed he would have had cause to detain Mr. Blackburn and search the truck even if he had

not voluntarily consented; however, these measures were unnecessary due to Mr. Blackburn's consent. The Court again finds Officer Hise's testimony to be credible in this regard and rejects the conflicting testimony of Mr. Blackburn as not credible. Based on the totality of the circumstances, the Court finds that the officer did not create an atmosphere of duress or coercion and that Mr. Blackburn's consent to a search of the truck was therefore voluntary.

V

The Court must next consider the search of the truck exceeded the scope of Mr. Blackburn's consent. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness – what the typical reasonable person would have understood by the exchange between the officer and the suspect. *See United States v. Ramstad*, 219 F.3d 1263, 1266 (10th Cir. 2000).

The Court finds that when Mr. Blackburn responded, "Go ahead," to Officer Hise's request to search the truck, the scope of his consent extended to the entire truck, including the bed area. Again, the Court credits the testimony of Officer Hise. The Court finds the testimony of Mr. Blackburn that he consented only to a search of his duffle bag and briefcase in the cab area is not credible. Moreover, Mr. Blackburn witnessed the search of his vehicle from only a few feet away but did not attempt to withdraw consent or otherwise object to a complete search. *See United States v. Dewitt*, 946 F.2d 1497, 1501 (10th Cir. 1991) ("[I]t would be reasonable to conclude that defendant's acquiescence indicated that the search was within the scope of the consent.").

VI

Finally, the Court must consider whether the exchange between Officer Hise and Mr. Blackburn regarding the key to the camper shell limited the scope of the consent.[2] Officer Hise asked Mr. Blackburn for the key to the camper shell when he realized it was locked. In response, Mr. Blackburn stated that he did not have a key. At that point, Officer Hise tried the tailgate handle and pulled down the tailgate. Officer Hise did not use any tools or special force to open the tailgate. There is no evidence in this record that any enhanced measures were taken for purposes of entering the bed area of the truck. Officer Hise simply pulled down the tailgate. This is consistent with the testimony of Officer Hise, but also corroborated by the testimony of Mr. Blackburn, who was not aware of any damage that was done in the course of opening the tailgate, which occurred only a few feet in front of him. Therefore, the Court finds that Mr. Blackburn's statement that he did not have a key did not limit the scope of the original consent to search that was given with respect to the truck.

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[2] If Officer Hise had not previously obtained Mr. Blackburn's consent to search the entire vehicle, but had instead simply asked Mr. Blackburn for the key to the camper shell, the inquiry would be quite different. The statement, "I don't have a key" certainly can indicate that no consent to search has been given. *See United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979); *United States v. Paoloca*, 36 F.3d 1099 (7th Cir. 1994) (unpublished table opinion). In this case, however, Officer Hise had already received permission to search the entire truck before he asked for the key to the camper shell. Therefore, the question is whether Mr. Blackburn's statement that he did not have a key withdrew or otherwise limited his consent to search the bed area of the truck. The Court finds that it did not.

VII

Based on the above, the Court finds that the initial traffic stop was constitutional, that Mr. Blackburn was not impermissibly detained, that Mr. Blackburn's consent to the search of the truck was knowing and voluntary, and that Mr. Blackburn's statement that he did not have a key to the camper shell did not limit the scope of his consent. Accordingly, Defendant's motion to suppress is hereby denied.

IT IS SO ORDERED.

This 20th day of February, 2002.

/s/ Sven Erik Holmes
Sven Erik Holmes
United States District
Judge

IN THE DISTRICT COURT IN AND FOR CRAIG COUNTY STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. CF-2000-63
THOMAS L. BLACKBURN, Defendant.	)	

ORDER SUPPRESSING EVIDENCE AND DISMISSING CASE WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 30, 2001)

NOW, on this 25th day of April, 2001, the matter of Defendant's Motion to Suppress, and the Findings of Fact and Conclusions of Law submitted by Plaintiff and Defendant. The Court, after hearing arguments of counsel at hearing held on the 21st day of ~~April~~ February, 2001, and the evidence submitted, finds that this Court should adopt the Findings of Fact and Conclusions of Law submitted by Defendant, and set out herein, to-wit:

Findings of Fact

1. On May 12, 2000, Defendant was stopped by Trooper Gene Hise for allegedly exceeding the speed limit by traveling 52 m.p.h. There was no other reason for the trooper to make the traffic stop according to the testimony and evidence.

2. Speed limit signs placed on the Will Rogers Turnpike showed the speed limit to be 45 m.p.h. in the location where Defendant was stopped.

3. At the time Defendant was stopped, there was no active construction taking place nor were there any construction workers present. The highway was a four lane highway with the shoulder of the road having cones of barrels on it for a construction zone.

4. The actual speed limit on May 12, 2000, was a minimum of 50 m.p.h. and a maximum of 75 m.p.h., and therefore, Defendant was not exceeding the speed limits set by the legislative [sic] in 47 O.S. §11-801. In fact, all parties agreed that Defendant was not exceeding the speed limit, at no fault of the O.H.P. JDG Trooper.

5. It was not until January 18, 2001, that the Oklahoma Transportation Authority, with the approval of the Commissioners of Public Safety, took any steps tochange [sic] the speed limits for construction zones on any turnpike in Oklahoma, including the Will Rogers Turnpike. (See Exhibit 5)

6. But for the traffic stop, no evidence would have been discovered with which to prosecute Defendant.

7. There was no evidence offered to the Court at the hearing on the Motion to Suppress that Defendant violated any other traffic provisions, including but not limited to, driving too fast for conditions.

Conclusions of Law

1. When the trooper stopped Defendant for allegedly exceeding the speed limit, the trooper effected a "seizure" within the meaning and protections of the Fourth Amendment to the United States Constitution. *State v. McNeal*, 6 P.3d 1055 (Okla.Crim.App.

2000); *United States v. Erwin*, 875 F.2d 268 (10th Cir. 1989); *Colorado v. Bannister*, 449 U.S. 1, 101 S.Ct. 42 (1980); *Casteliano v. State*, 585 P.2d 361 (Okla.Crim. App. 1978).

> "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer. Title 22 O.S 1971, §190. 6A C.J.S. Arrest §2, defines arrest as:
>
> > 'The taking, seizing, or detaining the person of another either by touching, or by any act which indicates an intention to take him into custody and subject the person arrested to the custody and subject the person arrested to the actual control and will of the person making the arrest, or any deprivation of the liberty of one person by another or any detention of him, for however short a time, without his consent, and against his will, whether it was by actual violence, threats, or otherwise . . . '
>
> "Thus, if a suspect is interrupted and his liberty of movement is restricted by the arresting officer, then arrest is complete. *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). In Henry, the officers received information of an undisclosed nature from the defendant's employer, which implicated the defendant with the theft of interstate shipments of whiskey. After receiving this tip and after observing defendant load some cartons in an automobile and drive away, officers, without a warrant,

> stopped the automobile containing the defendant and another man. Their search revealed stolen articles. The United States Supreme Court stated:
>
> > '(T)he arrest took place when the federal agents stopped the car . . . When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed . . .'"

See *Moran v. United States*, 404 F.2d 663 (10th Cr. [sic] 1968); *Green v. State*, 508 P.2d 1095 (Okl.Cr. [sic] 1973).

United States v. Erwin, 875 F.2d 268 (10th Cir. 1989), at page 270, states:

> "We believe the traffic stop in this case implicates an interest of defendant that the Fourth Amendment was designed to protect. In challenging the stop, defendant is objecting to the seizure of his person, and the 'Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of arrest.' *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975). It is beyond dispute that a vehicle's driver may challenge his traffic stop, and we see no reason why a person's Fourth Amendment interest in challenging his own seizure should be diminished merely because he was a passenger, and not the

> driver, when the stop occurred. Drivers and passengers have similar interest in seeing that their persons remain free from unreasonable seizure. *Accord State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *see also United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985) ('stopping a car and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment'); *Delaware v. Prouse*, 440 U.S. 648, 653, 99 St.Ct. [sic] 1391, 1401, 59 L.Ed.2d 660 (1979). Furthermore, we reject any notion that a vehicular stop detains for Fourth Amendment purposes *only* the driver simply because the passenger may be free to depart. *See Berkemer v. McCarty*, 468 U.S. 420, 436, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317 (1984) ('It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicles . . . Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.') Thus, we conclude that defendant may challenge the legality of the traffic stop in this case."

2. To effect a seizure in a traffic stop or other misdemeanor, 1) a crime must have occurred and 2) the crime must have been committed in the officer's presence. *Barnett vs. State*, 235 P.2d 555 (Okla.Crim.App. 1951); 22 O.S. §196.

3. When a warrantless seizure or arrest is made, the burden is upon the state to prove it valid and constitutionally sound. *State v. McLemore*, 561 P.2d 1367 (Okla.Crim.App. 1977).

4. 47 O.S. §11-8-1(B)(1) prescribes a maximum speed limit of 75 m.p.h. on the Will Rogers Turnpike.

5. 47 O.S. §11-1401(i) allows the Turnpike Authority to change the speed limit *only* after approval of the Commissioner of Public Safety. On May 12, 2000, the speed limit was set at a minimum 50 m.p.h. and maximum of 75 m.p.h. as shown on Defendant's Exhibit "4" and "5" on all areas of the Will Rogers Turnpike, including, but not limited to, the location the Defendant was stopped.

6. Without 47 O.S. §1401(i) being complied with in its entirety, the construction crews were not authorized by law to put 45 m.p.h. speed limit signs on the turnpike absent other legislative change.

7. The State has alleged that 47 O.S. §1401(i) is perhaps a matter of interpretation of first impression. Defense believes the issue raised is not new as discussed in *Barnett* and other cases presented by Defendant. The State still carries the burden of proof and criminal statutes are construed in favor of defendants as cited above. Additionally, when interpreting a statute, judicial construction over a long period of time is to be followed by the court if in existence. If there is no precedence, the court is not to search beyond the statute when the statute is clear and unambiguous. If the law is not clear, then the governmental agency [sic] charged with carrying out its provisions are to be given or accorded due consideration to their interpretation. *McCain v. State Election Board*, 289 P.2d 759 (Okl. 1930).

   In this case, the resolution/regulation adopted January 18, 2001, by the Turnpike Authority and Secretary of Transportation have [sic] the exact same interpretation as does the Defendant. (See Exhibit

"5"). The Court should likewise interpret the law in this case.

8. While the State contends that Trooper Hise acted in good faith, the Oklahoma Supreme Court has repeatedly rejected good faith to be a cure for a seizure or Fourth Amendment violations when no written arrest or search warrant was in effect at the time. This is so even when it later results in a consent to search. *Overall v. State ex rel. Dept. of Public Safety*, 910 P.2d 1087 (Okla.App.Div. 4 1995); *Greene vs. State*, 508 P.2d 1095 (Okla.Crim.App. 1973); *Castellano vs. State*, 585 P.2d 361 (Okla.Crim.App. 1978); *Tomlin v. State*, 869 P.2d 334 (Okla.Crim.App. 1994).

> "First, there is no 'good-faith exception' to the rule excluding illegally-obtained evidence for warrantless misdemeanor arrests. The good-faith exception in the search-and-seizure context applies only in a very limited number of cases where officers, in good faith, rely on what appears to be a valid search warrant. *See United States v. Leon*, 468 U.S. 897, 919-21, 104 S.Ct. 3405, 3418-19, 82 L.Ed.2d 677 (1984). This court has refused to extend the exception to any other types of cases. *See Farmer v. State*, 759 P.2d 1031, 1932 (Ok.Cr. [sic] 1988) (court refused to extend good-faith exception to consent searches); *See also Solis-Avila v. State*, 830 P.2d 191, 192 (Okl.Cr. [sic] 1992). An officer's good faith in making a warrantless felony arrest is not an acceptable substitute for probable cause, regardless of where he gets his information. See *Castellano v. State*, 585 P.2d 361, 365-66 (Okl.Cr. [sic] 1978); *Greene v. State*, 508 P.2d 1095, 1098 (Okl.Cr. [sic] 1973). If good faith cannot save a warrantless felony arrest, surely it cannot save

a warrantless misdemeanor arrest, where the need for a factual basis for the arrest is much greater.

9. Trooper Hise, who is on the turnpike for the purpose of looking for drugs on the Drug Intervention Squad of the Oklahoma Highway Patrol, stopped Defendant as a pretextual stop, as there was no violation existing to make the stop.

> "The trooper testified he stopped Petitioner because he failed to dim his headlights. This is a crime in Oklahoma. See *Skelly v. State*, 880 P.2d 401, 404 (Okl.Cr.App. [sic] 1994) ('By definition a pretextual stop lacks probable cause and thus would be illegal. . . . The officer's articulated reason for stopping the Skelly car, that the tag light was out, is a traffic violation committed in his presence. This traffic violation provided probable cause for the initial stop'); 47 O.S. §12-222. Despite this, Petitioner claims the stop was merely a subterfuge. We have rejected this rationale in the past when a valid traffic stop was the reason for the initial stop." *Lozoya v. State*, 932 P.2d 22 (Okla.Crim.App. 1996).
>
> "By definition a pretextual stop lacks probable cause and thus would be illegal. *See Johnson v. State*, 92 Okla.Crim. 63, 220 P.2d 469 (1950); *Bagwell v. State*, 327 P2d 479 (Okl.Cr. [sic] 1958); *Fields v. State*, 463 P.2d 1000 (Okl.Cr. [sic] 1970). The officer's articulated reason for stopping the Skelly car, that the tag light was out, is a traffic violation committed in his presence. This traffic violation provided probable cause for the initial stop. See 47 O.S. 1981 §12-204(C)."

10. No act is a crime unless made so by statute. 21 O.S. §2.

> "All crimes in Oklahoma are statutory. 21 O.S. 1981, §2. No act is a crime unless made so by statute. *Griffin v. State*, 357 P.2d 1040, 1046 (Okla.Crim.App. 1960); *State v. Stegall*, 96 Okl.Cr. [sic] 281, 253 P2.d [sic] 183, 187 (1953). The matter of defining crimes and fixing the degrees of punishment is one of legislative power. *Hunter v. State*, 375 P.2d 357, 362 (Okla.Crim.App. 1962). The essential elements of a crime are those set forth in the statues [sic] defining the offense. *State v. Laymani*, 357 P.2d 1022, 1031, 1033 (Okla.Crim.App. 1960)."

11. The criminal statutes are to be construed strictly against the State and liberally in favor of the accused. *State v. Young*, 989 P.2d 949 (Okl.Cr. [sic] 1999).

12. There was no evidence that Defendant violated any other traffic law, including, but not limited to, 47 O.S. §11-1401(h) for driving in a manner not reasonable and proper. Law enforcement has not nor can they exchange their probable cause for the seizure if such evidence and opinion had been put in the record. Additionally, there are numerous two-lane 65 m.p.h. highways without shoulders across the State. There was no evidence of ice, rainy conditions, width of road conditions or other traffic conditions that would have required the Defendant to go less than 52 m.p.h. There was also no evidence of crossing center lines, swerving, etc. Additionally, there was no evidence that 47 O.S. §11-1401(h) was the reason for the stop. For the Court to make such finding, the Court would have to do what the trial court did incorrectly in *Leigh v. State*, 587 P.2d 1379 at 1383 & 1384 (Okl.Cr. [sic] 1978):

"Nevertheless, the trial court proceeded from finding no probable cause to admitting the evidence on the basis of stop and frisk. In order to rule as it did, the trial court must have gone beyond the evidence presented before it to assume a set of facts that are unestablished in the record but which were necessary to justify the arrest and evidence therefrom. It is not the function of the trial court to assume what could have been in order to justify the presentation of the prosecution's case. Rather, as stated in *Green v. State*, supra, 'Once a warrantless arrest or search is challenged, the burden is on the prosecution to prove it was lawful.' At the evidentiary hearing, the prosecution failed to establish probable cause for the arrest and did not establish a basis for the initial detention of the defendant on the basis of stop and frisk or any other grounds."

13. As a result of the illegal stop and regardless of the good faith of the trooper, all evidence should be suppressed. *Castellano v. State*, 585 P.2d 361 (Okla.Crim.App. 1978).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Defendant's Motion to Suppress should be and is hereby sustained, and all evidence in the case as a result of the traffic stop is hereby suppressed, and Defendant's Motion to Dismiss is hereby granted.

Dated this 30th day of April, 2001.

/s/ James D. Goodpaster
Judge of the District Court